



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

October 11, 1996

Mr. Dan T. Saluri  
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City of Lubbock  
P.O. Box 2000  
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OR96-1857

Dear Mr. Saluri:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 101306.

The City of Lubbock (the "city") originally received two requests for copies of all proposals it received in response to Request for Proposal #13502. You asserted that the requested proposals are excepted from required public disclosure pursuant to sections 552.104, 552.105, and 552.110 of the Government Code, and section 252.049 of the Local Government Code. In Open Records Letter No. 96-1217 (1996), this office concluded that, during the pendency of the bid, the city could withhold the requested information under section 552.104 and did not address the other claimed exceptions. However, you advise us that while the city's request for a ruling was pending in our office, the bid was awarded. Therefore, you now ask that we rule on the section 552.110 exception.<sup>1</sup>

In connection with the original two requests, this office notified the companies who submitted proposals of these requests. See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have received arguments from six of those companies so notified: LG & E Power Marketing, Inc. ("LPM"), Duke/Louis Dreyfus L.L.C. ("D/LD"), Enron Power Marketing, Inc. ("EPMI"), The Texas Wind Power Company ("Texas Wind"), Oklahoma Gas & Electric Company ("OG&E"), and Central and South West Services,

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<sup>1</sup>We note that, since the ruling was issued on the original two requests for information, the city has received two more requests for this same information. We address all of the requests in this ruling.

Inc. ("CSWS").<sup>2</sup> Thus, we have no basis on which to determine the applicability of section 552.110 and the proposals must be disclosed.

Section 552.110 excepts from disclosure trade secrets or commercial or financial information obtained from a person and confidential by statute or judicial decision.<sup>3</sup> We address the second prong of this exception first. LPM, EPMI, OG&E, and CSWS argue that either their entire proposal or parts thereof are protected under the second prong of section 552.110. In Open Records Decision No. 639 (1996), this office established that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act in applying the second prong of section 552.110. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770. "To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted).

After reviewing the information submitted by the third parties, we conclude that LPM, EPMI, OG&E, and CSWS have met their burden of establishing that parts of their proposals are confidential commercial or financial information under the second prong of section 552.110. Therefore, the city must withhold the portions of these bids for which these parties claimed an exception. The city may not withhold the remainder of these

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<sup>2</sup>At least one of the third parties claimed that its proposal was submitted with the expectation that the city would keep the proposal confidential. We note that information is not excepted from disclosure merely because it is furnished with the expectation that it will be kept confidential. *See, e.g.*, Open Records Decision No. 180 (1977).

<sup>3</sup>Several of the third parties claimed that section 252.049 of the Local Government Code excepts their proposals from required public disclosure. That statute provides: "If provided in a request for proposals, proposals shall be opened in a manner that avoids disclosure of the contents to competing offerors and keeps the proposals secret during negotiations. All proposals are open for public inspection after the contract is awarded, but trade secrets and confidential information in the proposals are not open for public inspection." We conclude that this provision is duplicative of the protection of section 552.110 after the contract has been awarded. Therefore, we address only the arguments made under that exception.

bids.<sup>4</sup>

We now address the first prong of section 552.110, which encompasses trade secrets. The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we accept a private person's claim for exception as valid under that branch if that person establishes a prima facie case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.<sup>5</sup>

D/LD presumably claims that all of its proposal is a trade secret. After reviewing

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<sup>4</sup>As these parties claimed that both prongs of section 552.110 protected the same portions of the submitted proposals, given our ruling under the second prong of section 552.110, we need not address these parties' arguments under the trade secret prong.

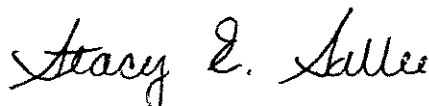
<sup>5</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and other involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." RESTATEMENT OF TORTS, § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

the submitted information, we conclude that D/LD has not met its burden of establishing that its proposal is a trade secret. Therefore, the city may not withhold D/LD's proposal under section 552.110.

Texas Wind claimed that its information is confidential but did not establish that either the first or second prong of section 552.110 applies to its proposal. Therefore, the city may not withhold Texas Wind's submitted proposal.<sup>6</sup>

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee  
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Open Records Division

SES/ch

Ref.: ID# 101306

Enclosures: Submitted documents

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<sup>6</sup>One of the third parties claims that its information is protected by privacy. Corporations do not have a right to privacy. See Open Records Decision No. 192 (1978). The right of privacy is intended to protect the feelings and sensibilities of human beings; it does not protect information about private corporations. Open Records Decision No. 624 (1994) and authorities cited therein. Thus, the city cannot withhold any of the submitted information under a right of privacy.

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